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No. 86-1782

In the Supreme Court of the United States

OCTOBER TERM, 1987

BLACK HILLS POWER AND LIGHT COMPANY, ET AL.,
PETITIONERS

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether the South Dakota Public Utilities Commission has the power to regulate the federal government's procurement of electricity for Ellsworth Air Force Base, a military installation of the Department of Defense.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 808 F.2d 665. The opinion of the district court (Pet. App. 25a-40a) is unreported. The opinion of the South Dakota Public Utilities Commission (PUC) (Pet. App. 41a-56a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 57a) was entered on January 7, 1987. A petition for rehearing was denied on February 4, 1987 (Pet. App. 58a). The petition for a writ of certiorari was filed on May 4, 1987. The jurisdiction of this Court is presumably invoked under 28 U.S.C. 1254(1).[1]

[1] Petitioners erroneously cite 28 U.S.C. 2101(c) as the basis for jurisdiction (Pet. 2).

STATEMENT

This case arises out of an attempt by the PUC to prevent the United States from seeking the most advantageous contract for the purchase of electricity for Ellsworth Air Force Base (Ellsworth). The PUC purported to order the United States to buy the power in question from a particular investor-owned utility, Black Hills Power and Light Company (Black Hills) (Pet. App. 41a-56a). The district court overturned the PUC's ruling, holding, inter alia, that its attempt to regulate procurement activity of the United States violated federal law and was therefore barred under the Supremacy Clause (*id.* at 25a-40a). The court of appeals affirmed (*id.* at 1a-22a).

1. Ellsworth, a military installation of the United States Air Force, is located in parts of Meade and Pennington Counties, South Dakota. It occupies 4,856.76 acres, of which about 88% (4,261.57 acres) has been ceded by South Dakota to the exclusive jurisdiction of the United States. Apart from the Renel Heights housing area, all electrical distribution, transmission, transformation, and street lighting systems located on Ellsworth are owned, operated, and maintained by the federal government. Pet. App. 3a-4a, 28a-29a.

Black Hills, a South Dakota electric utility regulated by the PUC, provides electric service to the Renel Heights housing area.[2] That service comprises only 5.3% of Ellsworth's total electrical consumption. Prior to 1984, Ellsworth's main base electric power needs (over 94% of its consumption) had been met by the Western Area Power Administration (WAPA), an agency of the United States Department of Energy. In 1984, however, WAPA determined that it could no longer supply all of Ellsworth's

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[2] The Renel Heights electrical system, which is owned by Black Hills, is not compatible with the WAPA-owned system (Pet. App. 4a).

main base needs. Accordingly, the United States undertook to obtain this additional power through the solicitation of bids. Pet. App. 4a, 29a.

Five suppliers, including Black Hills, submitted bids. At the time it submitted its bid, Black Hills raised no challenge to the propriety of the bid procedure. The contract was awarded to Heartland Consumers Power District (Heartland), the lowest bidder, and in October 1984 Heartland and the United States entered into a one-year contract for the delivery of electricity. Pet. App. 4a. When this contract expired in October 1985, the United States again solicited bids for this electricity, and Heartland's bid was again the lowest. In 1986, the lowest bidder for the one-year contract was Basin Electric Power Cooperative, a North Dakota entity; that out-of-state entity is currently supplying the additional power to Ellsworth. Pet. App. 6a.

2. Black Hills initially challenged the award of the contract by filing a protest with the Ellsworth contracting officer. In November 1984, before that officer had responded to the protest, Black Hills filed a complaint with the PUC, claiming, inter alia, that Ellsworth is located in Black Hills' utility service territory and that Black Hills, not Heartland, should be allowed to supply electricity to Ellsworth. Pet. App. 4a, 29a.

Following a three day evidentiary hearing, the PUC held that it had jurisdiction to determine which utility company had the right to supply Ellsworth with electricity. On the merits, it ruled that because Ellsworth is located primarily in Black Hills' service area, and because a portion of Ellsworth was not ceded to the United States, Black Hills is entitled to supply all of the electricity at the base in excess of that supplied by WAPA. Pet. App. 5a, 29a, 41a-56a.

Heartland, the United States, and another party all filed appeals with the South Dakota circuit courts. The United

States subsequently removed the appeals to the United States District Court for the District of South Dakota. In addition, Black Hills filed an action in that court seeking an order directing the United States to contract with it. The district court consolidated the four cases. Pet. App. 6a.

Various motions were filed in the consolidated cases. In October 1985, the district court granted the federal government's motion to dismiss Black Hills' suit and ruled that the other cases were thereby rendered moot. The court held that under the Supremacy Clause (Art. VI, Cl. 2) the PUC has no power to order the United States to contract with a particular utility. It further held that because Ellsworth is a federal enclave, the PUC lacks jurisdiction over it. In the alternative, the court held that South Dakota's utility statutes are inapplicable to the United States. Pet. App. 6a, 25a-40a.

3. The court of appeals affirmed (Pet. App. 1a-22a) and later denied rehearing en banc (*id.* at 58a). The court held that because 88% of Ellsworth was ceded to the United States by South Dakota, the United States has exclusive jurisdiction over the base under Art. I, § 8, Cl. 17, which grants Congress exclusive jurisdiction over federal enclaves (Pet. App. 7a-8a). The court rejected the PUC's assertion that it was not attempting to exercise jurisdiction over the United States but only over the suppliers of electricity, noting that this Court had previously rejected similar contentions (*id.* at 9a). The court also rejected the PUC's assertion that it could exercise jurisdiction over Ellsworth because approximately 12% of the base was not ceded to the United States (*id.* at 10a).

In addition, the court held that Congress did not intend to allow states to regulate the procurement of electricity by federal enclaves. It observed that federal procurement law is designed to ensure competition so that the United States will receive the most advantageous contract. Pet. App.

13a-14a. The court rejected petitioners' claim that Congress evidenced a contrary intent when it enacted a rider to the 1987 appropriations bill, Act of Oct. 30, 1986, Pub. L. No. 99-591, § 9111, 100 Stat. 3341-120 [hereinafter Pub. L. No. 99-591]. The court noted that Congress was concerned about a particular situation—not present here—in which a federal facility that obtains all of its electricity from a single supplier decides to abandon that supplier after the necessary capacity has been built (Pet. App. 21a).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

1. Under the Constitution, Congress has the power "[t]o exercise exclusive Legislation * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings" (Art. I, § 8, Cl. 17). This grant of legislative power over federal enclaves "by its own weight, bars state regulation without specific congressional action." *Paul* v. *United States*, 371 U.S. 245, 263 (1963).

In the area of electricity purchases by federal enclaves, Congress has not required federal procurement officers to follow state utility franchise law. To the contrary, the applicable statutes and regulations give federal officials broad authority to procure electricity through competitive bidding. For instance, the Federal Acquisition Regulation makes clear that the general rule is the advancement of "full and open competition in soliciting offers and awarding Government contracts" (48 C.F.R. 6.101 (citing 10 U.S.C. (Supp. III) 2304)). In addition, an agency head has discretion to avoid using competitive procedures only in certain circumstances, such as when "the property or serv-

ices needed by the agency are available from only one responsible source and no other type of property or services will satisfy the needs of the agency" (10 U.S.C. (Supp. III) 2304(c)(1)) (see Pet. App. 14a-15a). Consistent with the above principles, this Court has held in various contexts that the states may not interfere with federal procurement activities. See *United States* v. *Georgia Public Service Comm'n*, 371 U.S. 285 (1963) (State of Georgia cannot prevent federal government from seeking competitive bids for intrastate shipments of household goods of federal employees); *Paul* v. *United States, supra* (invalidating California's attempt to enforce its wholesale price regulations with respect to milk sold to the United States at three military installations); *Public Utilities Comm'n* v. *United States*, 355 U.S. 534 (1958) (California tariffs for carriers cannot be applied to carriers transporting government property, since to do so would interfere with procurement officer's discretion to negotiate lower rates); *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956) (where contractor submitted bid to construct certain facilities at Air Force base in Arkansas, it could not be prosecuted for undertaking project without obtaining a state license).

2. Petitioners' principal argument (Pet. 7-11) is that under Pub. L. No. 99-591, the states are entitled to regulate the procurement of electricity on federal enclaves. Petitioners recognize (Pet. 10) that this legislation was not applicable to the initial bid in question, which occurred in 1984. Nonetheless, they claim that this enactment clarifies and confirms Congress's intent. That argument lacks merit.[4]

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[4] Black Hills' reliance on Pub. L. No. 99-591 is puzzling in light of the legal position it has taken in another case. In a proceeding before the Public Service Commission of the State of Wyoming, *Tri-County Electric Ass'n* v. *Black Hills Power & Light Co.*, No. 9544, Black Hills took the view that "the Public Service Commission of Wyoming does not have jurisdiction to regulate the United States Government and

Pub. L. No. 99-591, a rider to the 1987 appropriations bill, prohibits any funds appropriated for the Department of Defense (DOD) in 1987 to be used to implement or enforce two regulatory provisions: (1) Section 8.304-91 of the Air Force Federal Acquisition Regulation Supplement (issued on June 24, 1985) [hereinafter the Air Force regulation][5] and (2) a rule proposed on May 7, 1986, by the DOD, the General Services Administration, and the National Aviation and Space Administration, 51 Fed. Reg. 16989 (to be codified at 48 C.F.R. Pt. 41) [hereinafter the May 7, 1986, proposed regulation]. The Air Force regulation and the May 7, 1986, proposed regulation provide that contracting officers must obtain utility services competitively and may not rely on state or local franchise service territories as a basis for concluding that only one supplier can provide the necessary services (see Pet. App. 18a-19a n.8). Those regulations remove the discretion of federal agencies by *requiring* the use of competitive procedures.

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determine from whom the United States is able to purchase its electric service" (Motion to Dismiss and Answer to Complaint 1). Blacks Hills was defending against a claim that it was not entitled to supply power to an Air Force site in Wyoming. Black Hills cited the court of appeals' decision below in a pleading filed in that case on April 13, 1987 (*ibid.*). It noted (*id.* at 2) that while it "believe[d] the law *ought* to be otherwise," the Eighth Circuit's decision below and the Supremacy Clause "establish the law until overturned by further court action *or by Act of Congress*" (*ibid.* (emphasis added)). Even though Wyoming is in the Tenth Circuit, and even though Pub. L. No. 99-591 had been enacted six months earlier, Black Hills relied entirely on the decision below and did not cite Pub. L. No. 99-591 or suggest that its position was undermined by any congressional enactment.

[5] The Air Force regulation, which is not published in the Federal Register, was issued by the Department of the Air Force as an internal procurement management instruction (Pet. App. 19a).

As the court of appeals explained (Pet. App. 21a (citing legislative history)), Congress's main concern in passing Pub. L. No. 99-591 involved the situation in which a federal facility that obtains its electricity from a single utility later switches to another utility and abandons its previous supplier after the required capacity has been built. In this case, Black Hills did not construct additional capacity to serve Ellsworth. Indeed, Ellsworth's principal supplier is WAPA, not Black Hills. There is no reason to think that Congress, in passing Pub. L. No. 99-591, intended to effect such a far-reaching change in federal procurement law as to require the United States to buy all of its electricity for a federal enclave from whichever utility holds a state or local franchise.

Petitioners' reliance on subsequent congressional action to support its position is particularly weak in this case[6] in light of the clear statutory and regulatory intent under preexisting law. As the court of appeals noted (Pet. App. 18a (footnote omitted)), "the actions of the Air Force in seeking competitive bidding for the overrun electricity were clearly authorized by the relevant procurement statutes and regulations."

3. Petitioners also claim (Pet. 11-17) that the court of appeals' decision conflicts with this Court's judgment in *United States* v. *State Corporation Comm'n*, 345 F. Supp. 843 (E.D. Va. 1972), aff'd, 409 U.S. 1094 (1973). That argument likewise lacks merit.

As petitioners recognize (Pet. 13), this Court's ruling in *State Corporation Comm'n* was simply an affirmance without opinion. Nonetheless, petitioners cite *Mandel* v. *Bradley*, 432 U.S. 173 (1977), and assert that this Court's summary affirmances are fully binding (Pet. 13). They fail to note that in *Mandel*, the Court stated (432 U.S. at 176)

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[6] This Court has stated that "arguments predicated upon subsequent congressional actions must be weighed with extreme care" (*Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980)).

that "a summary affirmance is an affirmance of the judgment only" and that "[s]ummary actions * * * should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *State Corporation Comm'n* involved rates, not state area franchise rules or the selection of the lowest bidder, and the government had specifically deferred to state regulation of such rates. Indeed, petitioners undermine their reliance on the Court's summary affirmance in *State Corporation Comm'n* by stating elsewhere in their petition (at 7) that the present case presents an issue "which has not been but should be settled by this Court."

4. Finally, there is no merit in petitioners' claim (Pet. 17-18; see Pet. App. 10a) that the PUC is entitled to exercise jurisdiction over Ellsworth (or at least 12% of it) because 12% of that Air Force base is on land that has not been ceded to the United States. As the court of appeals stated (*ibid.* (citing *United States* v. *State Tax Comm'n*, 412 U.S. 363 (1973)), "exclusive federal jurisdiction over eighty-eight percent of the base need not be surrendered because of the possibility that the purchase and distribution of electricity within the enclave may affect the need for electricity on the small section of the base that is still within South Dakota's jurisdiction."[7]

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[7] The court explained (Pet. App. 10a) that the overrun power supplied to Ellsworth is commingled with the WAPA-supplied power and that "it is impossible to determine what portion of the base is served by WAPA and what portion is served by the private utility."

This Court's decision in *Adams* v. *United States*, 319 U.S. 312 (1943), cited by petitioners (Pet. 17), is inapposite. That case involved questions relating to federal jurisdiction over criminal prosecutions and provides no support for petitioners' position that the PUC may exercise jurisdiction over Ellsworth because a small percentage of the land on the base has not been ceded to the federal government.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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